

Family Transfer Research

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Madam Chair, member of the Committee. For the record, my name is Tara DePuy, Legal Counsel for MACo/JPIA.

I don't have the magic answer to the family transfer dilemma. I believe in full disclosure so I just wanted to get that out first. But hopefully I do have some information that will be helpful to you in your examination of the family transfer exemption.

Leanne provided you with a great background of the exemption and how the 2006 Model Subdivision Regulations address the exemption. The 2006 Model Subdivision Regulations are out-of-date and in a perfect world we would be able to tell you that CTAP and others are working on a new model that will be published soon, but it is not a perfect world. CTAP has started the process internally and one of the first sections that plan to address are the exemptions; but they can't promise you a date for the new model.

First, I just wanted to provide some legal background on exemptions. A 1983 attorney general opinion that addressed the use of several exemptions.

AG Opinion/Cases:

1. Allowed pursuant to 40 Op.AttyGen No. 16 (1983)

- a. MSPA liberally construed to effectuate promotion of public health/welfare
- b. exemptions must be narrowly applied
- c. county may require applicant to make an evidentiary showing to meet a burden of proof
- d. applicant may be required to submit an affidavit
- e. hearing procedure may be established

f. county may evaluate relevant facts – business interests, prior history of tract, proposed configuration, etc – county entitled to consider all relevant circumstances

g. exemptions . . . not provided to allow developer to create division of land which is nothing less than an un-reviewed exemption; rather the legislature provide exemption to deal with exceptional circumstances under which full plenary subdivision review is unnecessary

In 2005 the subsection requiring local subdivision regulations to establish evasion criteria and an appeals process mentioned by Leanne was added to Section 76-3-504. In 2006 the Model Subdivision Regulations were adopted. Since 2006 there have been two District Court cases that are relevant to this discussion. In 2008 in Gallatin County, the District court found that the local subdivision regulations which contained a rebuttable presumption for proposed relocation of common boundary lines was unlawful as it set out a *per se* or automatic rule. That case is:

2. Big Blue River, LLC v. Gallatin County, DV 08-731C

District court found rebuttal presumption for proposed relocation of common boundary lines was unlawful as it set out in essence a *per se* or automatic rule. *But, See Boyer below:*

But then in 2010 a different District Court here in Lewis and Clark County confirmed the use of a rebuttable presumption in regards to a family transfer exemption. That case is:

3. Boyer v. Lewis and Clark County, BDV 10-666

Boyers sought use family transfer exemption to create 5 lots on Hauser Lake. Previous owner from 1981-1008 used exemptions to divide the property on seven separate occasions. Review committee denied exemption and County Commission affirmed. Boyers sued claiming decision was arbitrary and capricious and an abuse of county discretion. Court cited 40 Op.AttyGen No. 16 that exemption to be narrowly construed and held that applicant did not overcome rebuttable presumption of evasion; not arbitrary or capricious nor an abuse of discretion.

Does that leave the use of rebuttable presumptions in regards to exemptions in a confused state? Yes, so in Gallatin County they amended their exemptions only in

regards to common boundaries and left rebuttable presumptions in their local subdivision regulations in regards to other exemptions.

2006 Model Subdivision Regulations

GB consider all surround circumstances: nature claimant's business, prior history of particular tract in question, proposed configuration of tracts if exempt transaction completed, and any pattern of exemption that results in equivalent of a subdivision without government review. (applies all exemptions)

Family Transfer: allow conveyance one parcel outside platted subdivision to each member of his or her immediate family (spouse, children (blood or adoption), or parents) in each county landowner owns property. COS using exemption, certificate of compliance on COS and deed or other conveying document required.

Rebuttable Presumptions:

1. An exemption used to create the tract proposed for family transfer.
2. Use family transfer is part of an overall development plan with such characteristics as common roads, utility easements, restrictive covenants, open space or common marketing or promotional plan.
3. Transfer parcel of land by one family member to another, by QCD, followed by an attempt to use the family transfer exemption.
4. Use family transfer to create more than one additional or remaining parcel of less than 160 acres.

Submittal: To subdivision administrator: COS, instrument conveyance, affidavit affirming entitlement to exemption.

Review: SA and review committee; SA makes written determination.

Appeal: Denial can be appealed to GB and may request a hearing and submit additional evidence.

Leanne provided you with the 2006 Model Subdivision Regulations and the process it recommends for local governments in examining the family transfer exemption. I did a search of county subdivision regulations that I could find on the internet. Not every county has a website and some counties do not post regulations on its website, so my research is limited by that factor.

Counties using model (that I could find on the internet) include: Cascade, Sanders Sheridan, Blaine, Broadwater. I did not research city subdivision regulations, but please remember that any changes to the exemption laws also affect cities.

Other Counties:

I just want to highlight for you some of the different processes and rebuttable presumptions from other counties which do not strictly follow the Model Subdivision Regulations. These counties may have some of the same rebuttable presumptions as the Model or one of the other counties I mention, so I am just giving you an array of the type of rebuttable presumptions used by the counties to evaluate whether a family transfer exemption is an attempt to evade the MSPA.

Missoula: Use affidavit and additional evasion criteria; public meeting before BOCC

- Divide tract which will become one of three or more parcels that have been divided from original tract by use of exemptions;
- Divide tracts by an applicant who has used exemptions to create parcels from the original tract or other tracts;
- Create parcel not intended for use as a homesite for the transferee
- Divide tracts recently transferred to the applicant
- Divide tracts that have been previously denied use of any other exemption
- Divide tracts for transfer to minor child
- Divide tracts for transfer to spouse
- Divide tract created through use of exemption

L&C: requires pre-application conference, review committee, appeal to committee, appeal to BOCC, hearing process and "rebuttable presumptions":

- Parcel not intended for homesite for transferred
- Transfer could be accomplished by relocation common boundary lines
- One of three or more parcels that were subdivided from the original tract
- Violates statutes, case law, administrative rules or AG opinions
- Applicant used exemptions to create parcels from original tract or other tracts
- Proposed division previously denied under any other exemption

- Parent purports to act as a guardian for a minor child without a trust instrument
- Intent is to divide land for purpose of a gift or sale to grantor's spouse

Yellowstone: Exemptions are not part of subdivision regulations; provide review process, examples of certificate of exemption to be on face of plat, and checklist of submittal information

- Corporation/partnership cannot use family transfer exemption
- Title in mixed ownership, brother/sister, cannot claim family exemption
- Lots within platted subdivisions are not eligible

Gallatin: Hearing before BOCC. Review committee provides a report. Claimant may present evidence (normally under sworn oath). Rebuttal presumptions:

- Exempt parcel leave more than one additional parcel less than 160 acres
- Member of family receive more than one exempted parcel in the county
- Exempted parcel being divided from tract that was previously created through use of an exemption, *including remainder tracts of less than 160 acres . . .* (pursuant to *Alta Vista v. Mills* case out of Gallatin County)

Ravalli: Regulations follow the model but add that a transferee must hold the exempted tract for three years. County provides a "Subdivision Exemption Guide". Applications are reviewed by the Planning Department at a public meeting. Also provide an application and a "notarized request for family transfer form" in which swear will not transfer tract for 3 years. No restrictions imposed on the remainder parcel.

I brought with me a copy of a family transfer exemption from Ravalli County. This would be an example of the use of a family transfer as part of an overall development plan with such characteristics as common roads, utility easements, restrictive covenants, open space or common marketing or promotional plan.

Park County: Follows model regulations but presumption that transfer within 3 years is an evasion. C/Recorder may refuse to file deed if there is a transfer within 3 years or court action to set aside land transfer. Review committee submits report to BOCC who makes the determination.

Sweet Grass: Exemptions are in an Appendix to Subdivision Regulation.

- Defines "pattern of development" as when 3 or more parcels of less than 160 acres with common covenants or facilities have been divided from the original tract.
- Presumes family transfer is an evasion if the tract was created through use of an exemption regardless of previous ownership of the tracts and pertain to remainders and tracts created through exemptions.
- Landowner claiming a parcel is a remainder must present evidence such as landowner's residence is on the parcel or buildings plans for a structure to be built by or for the landowner.

Flathead:

- Makes a distinction in the pattern of development between tracts of less than 20 acres (more than three parcels divided from original tract of less than 20 acres) and tracts great than 20 acres (more than four parcels under 20 acres, i.e. three exempt parcels and a remaining parcel, have been divided from the original tract of 20 acres regardless of ownership by use of exemptions.
- Also includes in pattern of development if exempt lots are contiguous to platted lots and shares roads with them or the exempted tracts have similar shape or size to the platted lots, or the exempted tracts are being created by the same landowner who created the platted lots.
- Adds review criteria that an evasion occurs if the division is made for purpose of speculation by the grantor or for resale for the benefit of the grantor by using the grantee as a "straw person"
- Adds review criteria that an evasion occurs if the grantee is also one of the grantors.

Richland: Uses the 2006 Model but also as a handout entitled "Exemption and Certificate of Survey Examination Process". In this handout there are additional review criteria:

- Title in mixed ownership is not eligible to claim family exemption.
- Notes that all tracts of record created by the survey must meet minimum lot sizes prescribed by any zoning in effect.

Lake: Requires more information with application such as an ownership and encumbrance report, documentation for sanitation if applicable, copies of existing or proposed deed restrictions, and any other permits required (zoning, floodplain, sanitation, etc.). Rebuttable presumptions add:

- Transfer of parcel of land by one family member to another, by QCD, followed by application for family transfer.
- Division is for speculation or by using the grantee as a "straw person".

Lincoln: Appears to use old model regulations and doesn't have an appeal process to BOCC.

Carbon: Allow examination of remainder if the remainder is created for evasion of the subdivision process.

Stillwater: Similar to Sweet Grass County regs. Also allows review of remainder to determine if it is intended to be an evasion of subdivision review.

The differences in rebuttable presumptions across the counties is an example of allowing local government control in developing evasion review criteria. One could also assume that as counties have encountered differing issues with family transfer exemptions, they have added additional evasion criteria to the local subdivision regulations.

For this presentation today, I solicited input from county civil land use attorneys and I received back a few comments. I am passing the comments on to you but these are not MACo sanctions suggestions. It is difficult for an association such as ours to recommend one fix to the family transfer exemption when the counties we represent have different development pressures. Developing counties face a lot of development pressure and perhaps more creative uses of the exemptions to subdivision review than more rural counties with little development. However,

MACo understands that the current family transfer exemption is problematic for some counties and we are here to assist the Committee in any manner we can.

So here are some of the suggestions I received:

Suggestions:

1. Provide counties with ability to have more restrictive regulation if go through a public hearing process. (note, currently 76-3-504(1)(p) allows governing body to determine whether proposed method disposing using 3-201/3-207 is an attempt to evade; regulations must provide for an appeals process to governing body if the reviewing authority is not the governing body).
2. Expand level of consanguinity; perhaps two levels with second level to include grandchildren, aunts, and uncles or allow county flexibility to do so.
3. Do not restrict family transfer for a period of years; difficult to track.
4. Allow transfer or sale outside the family due to recognized hardship (unforeseen financial distress) to be determined by governing body.

Observations during research:

During my research there were a few observations about the process I wanted to pass on to you.

1. Counties define differently what date to use to determine whether previous exemptions have occurred. Some use July 1, 1973 when the MSPA passed; some use July 1, 1974 when subdivision and platting act was effective and some use April 1, 1993.
2. Counties use difference review processes. Some require submittals to C/Recorder who then routes them through a committee. Other counties require submittals to the Planning Department who either just reviews or submits them to the review committee. In some counties the review committee makes the initial determination while in other the review committee makes a recommendation to the BOCC .

Thank you and I will be available for questions.

¹ County civil land use attorneys were solicited for input on the family transfer issue. A search of county subdivision regulations via the internet was conducted. Numerous smaller counties either do not have websites or do not post subdivision regulation on their website.